Supreme Court, U. S.
FILED
MAY 13 1974
MICHAEL RODAK, JR., CLERK

No. 73-858

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR THE APPELLANT

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INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Statutes and Constitutional Provisions Involved 2

Questions Presented 3

Statement of the Case 3

Summary of Argument 8

Argument 14

I. This Court Has Jurisdiction Of This Direct Appeal From The Three-Judge Court 14

A. When A Three-Judge District Court Is Properly Convened, This Court Has Jurisdiction Over Its Judgment Denying Injunctive Relief 14

B. A Substantial Constitutional Claim Was Alleged Against The Secretary Of State 15

C. The Claim Against Mercantile Was Properly Within The Pendant Jurisdiction Of The Three-Judge Court And Therefore This Court Has Jurisdiction Over That Portion Of This Appeal 27

1. The Claims Are Inextricably Interrelated 27

2. The Pendant Claim Raises A Substantial Constitutional Claim 29

II. Gonzalez Has Standing To Request An Adjudication Of The Constitutionality Of The Repossession And Title Transfer Statutes 35

PAGE

III. The Case Is Not Moot 40

A. The Actions Of The Secretary And Creditors Are Capable Of Repetition Giving Rise To A Continuing Controversy For Which Declaratory And Injunctive Relief Is Appropriate 42

B. This Case Is Clearly Not Moot As To The Secretary Because Without Judicial Relief He Is Free To Return To His Old Ways 48

C. This Case Was Filed As A Class Action By A Party Actually Harmed By The Enforcement Of The Statutes In Question To Vindicate His Own Rights And The Rights Of Those Similarly Situated 51

D. Termination Of The Damage Claim Against Mercantile Does Not Moot The Claims For Declaratory And Injunctive Relief Against Either Mercantile Or The Secretary 53

Conclusion 56

AUTHORITIES CITED

Adickes v. Kress & Co., 398 U.S. 114, 26 L.Ed.2d 142 (1970) 31

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 81 L. Ed. 617 (1937) 55

American Trial Lawyers Ass'n. v. New Jersey Supreme Court, 409 U.S. 467, 34 L.Ed.2d 651 (1973) 15

Atlantic Richfield Co. v. Oil Chemical & A. Wk'rs., Int'l. Union, 447 F.2d 945 (7th Cir. 1971) 45

Avco Corp. v. Local, UAW 787, 459 F.2d 968 (3rd Cir. 1972) 45

PAGE

Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962) 15, 35

Barlow v. Collins, 397 U.S. 159, 25 L.Ed.2d 192 (1970) 36

Bell v. Burson, 402 U.S. 535, 29 L.Ed.2d 90 (1971) 8, 10, 18, 22

Brockington v. Rhodes, 396 U.S. 41, 24 L.Ed.2d 209 (1969) 13, 43, 52

Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L.Ed.2d 45 (1961) 11, 32

Bus Employees v. Missouri, 374 U.S. 74, 10 L.Ed.2d 763 (1963) 13, 41, 51

Coe v. Armour Fertilizer Works, 237 U.S. 413, 59 L.Ed. 1027 (1915) 18, 39

Cypress v. Newport News General & Nonsectarian Hosp. Ass'n., 375 F.2d 648 (4th Cir. 1967) 51

Data Processing Service v. Kamp, 397 U.S. 150, 25 L.Ed.2d 184 (1970) 35, 36

DeFunis v. Odegaard, —— U.S. ——, 42 U.S.L.W. 4578 (Apr. 23, 1974) 13, 46, 52

Doe v. Bolton, 410 U.S. 179, 35 L.Ed.2d 201 (1973) ..13, 41

Evers v. Dwyer, 358 U.S. 202, 3 L.Ed.2d 222 (1958) 13, 41, 48

Flast v. Cohen, 392 U.S. 83, 20 L.Ed.2d 947 (1968) 8, 14, 15, 35

Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556 (1972) 8-9, 11, 12, 19, 22, 24, 30, 37, 39, 56

Gatling v. Butler, 52 F.R.D. 389 (D.Corn. 1971) 52

Gibbs v. Titelman, No. 72-2165 (E.D.Pa. Nov. 21, 1972) 21

Golden v. Zwickler, 399 U.S. 103, 22 L.Ed.2d 113 (1969) 46

PAGE

Goosby v. Osser, 409 U.S. 512, 35 L.Ed.2d 36 (1973) 8, 15

Goshen Mfg. Co. v. Meyers Mfg. Co., 242 U.S. 202 (1916) 49

Gray v. Sanders, 372 U.S. 368, 9 L.Ed.2d 821 (1963) ..13, 41

Hagans v. Lavine, —— U.S. ——, 42 U.S.L.W. 4381 (Mar. 25, 1974) 8, 15, 30, 31

Hall v. Beals, 396 U.S. 45, 24 L.Ed.2d 214 (1969) 50

Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 8 L. Ed.2d 794 (1962) 14

Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972), vacated 409 U.S. 815, 34 L.Ed.2d 72 (1972) 53

Indiana Employment Division v. Burney, 409 U.S. 540, 35 L.Ed.2d 62 (1973) 53

Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) 51

Lake Carriers' Assn. v. MacMullen, 406 U.S. 498, 32 L.Ed.2d 297 (1972) 10, 27

Lynch v. Household Finance Corp., 405 U.S. 538, 31 L.Ed.2d 424 (1972) 8, 14, 15

MacQueen v. Lambert, 348 F.Supp. 134 (M.D.Fla. 1972) 55

Michaelson v. Walter Lave, Inc., 336 F.Supp. 296 (E.D.Wisc. 1972) 21

Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643 (1967) .. 17

Moore v. Ogilvie, 394 U.S. 814, 23 L.Ed.2d 1 (1969) ..13, 41, 43

Moore Lodge No. 107 v. Irvis, 407 U.S. 163, 32 L.Ed. 2d 627 (1972) 19, 32

PAGE

Morey v. Doud, 354 U.S. 457, 1 L.Ed.2d 1485 (1967) .. 26

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 94 L.Ed. 865 (1950) 17

Parhem v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970) 51

Perez v. Ledesma, 401 U.S. 82, 26 L.Ed.2d 701 (1971) .. 29

Public Utilities Comm. v. Pollak, 343 U.S. 451, 96 L.Ed. 1068 (1952) 11, 32, 33

Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225 (1971) 26

Reitman v. Mulkey, 387 U.S. 369, 18 L.Ed.2d 830 (1967) 11, 32, 34

Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147 (1973) 13, 27, 28, 41

Shelley v. Kraemer, 334 U.S. 1, 92 L.Ed. 1161 (1948) ..11, 19, 22, 31

Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349 (1969) 9, 11, 20, 22, 30, 38, 56

Steffel v. Thompson, —— U.S. ——, 42 U.S.L.W. 4357 (Mar. 20, 1974) 43

Super Tire Engineering Co. v. McCorkle, —— U.S. ——, 42 U.S.L.W. 4507 (Apr. 16, 1974) 12, 41, 45, 48, 55

Thomas v. Clarke, 54 F.R.D. 245 (D.Minn. 1971) 52

United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945) 49

United States v. Concentrated Phosphate Ass'n., Inc., 393 U.S. 199, 21 L.Ed.2d 344 (1968) 45

United States v. Georgia Public Service Comm., 371 U.S. 285, 9 L.Ed.2d 317 (1963) 14

PAGE

United States v. Price, 383 U.S. 787, 16 L.Ed.2d 267 (1966) 31

United States v. Oregon Medical Society, 343 U.S. 326, 96 L.Ed. 918 (1952) 50

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 41 L.Ed. 1007 (1897) 49

United States v. W. T. Grant Co., 345 U.S. 629, 97 L.Ed. 1303 (1953) 45

Vaughan v. Bower, 313 F.Supp. 37 (D.Ariz. 1970) 52

Walling v. Helmerich & Payne, 323 U.S. 37, 89 L.Ed. 2d 29 (1944) 49

Watkins v. Chicago Housing Authority, 406 F.2d 1234 (7th Cir. 1969) 52

Weber v. Aetna Casualty Insurance Co., 406 U.S. 164, 31 L.Ed.2d 768 (1972) 26

Wilentz v. Sovereign Camp, W.O.W., 306 U.S. 573, 83 L.Ed. 994 (1939) 17

Wisconsin v. Constantineau, 400 U.S. 433, 27 L.Ed. 2d 515 (1971) 18

Zemel v. Rusk, 381 U.S. 1, 14 L.Ed.2d 179 (1965) 27

Zwickler v. Koota, 389 U.S. 241, 19 L.Ed.2d 444 (1967) 15, 43, 44, 45

United States Constitution:

XIV Amendment 2, 8, 18, 20, 26, 34, 42

United States Statutes:

28 U.S.C. §1253 2

28 U.S.C. §2202 .....2, 44

28 U.S.C. §2281 .....2, 8, 15

42 U.S.C. §1983 .....2, 55

Illinois Statutes:

PAGE

Ill.Rev.Stat. ch. 26, §9-503 .....2, 3, 27, 28, 30, 53

Ill.Rev.Stat. ch. 26, §9-504 .....2, 3, 27, 28, 30, 31, 33, 53

Ill.Rev.Stat. ch. 48, §39.2b 24

Ill.Rev.Stat. ch. 48, §39.4a 24

Ill.Rev.Stat. ch. 95½, §2-118 .....10, 25, 26

Ill.Rev.Stat. ch. 95½, §3-101(b) 16

Ill.Rev.Stat. ch. 95½, §3-107(c) 17

Ill.Rev.Stat. ch. 95½, §3-114(b) 2, 3, 21, 26, 28, 54

Ill.Rev.Stat. ch. 95½, §3-116(b) 2, 3, 28, 54

Ill.Rev.Stat., ch. 95½, §3-501 16

Ill.Rev.Stat. ch. 95½, §3-502 16

Ill.Rev.Stat. ch. 95½, §3-612 .....2, 3, 28, 33, 54

Ill.Rev.Stat. ch. 121½, §580 33

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vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and **WOOD ACCEPTANCE CORP.**, individually and as representatives of all others similarly situated, and **MICHAEL J. HOWLETT**, Successor to **JOHN W. LEWIS**, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 363 F.Supp. 143 and is contained in the Jurisdictional Statement at page 1a.

JURISDICTION

The decision of the district court dismissing the action was rendered, and an order entered, on August 16, 1973. Notice of Appeal was filed on October 4, 1973. The Jurisdictional Statement was filed in this Court on December 2, 1973. On February 25, 1974 this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits.

The jurisdiction of the Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Jurisdiction statutes: 28 U.S.C. §2281; 28 U.S.C. §1253; and 28 U.S.C. §§2201 and 2202, which are set forth in Appendix A at p. App. 1.

Constitutional provision: Amendment XIV, section 1 of the United States Constitution, which is set forth in Appendix B at p. App. 2.

Challenged statutes: sections 3-114(b),[1] 3-116(b) and 3-612 of the Illinois Motor Vehicle Code (Ill.Rev.Stat. ch. 95½, §§3-114(b), 3-116(b) and 3-612) which are set forth in Appendix C at p. App. 3; and sections 9-503 and 9-504[2] of the Illinois Commercial Code (Ill.Rev.Stat. ch. 26, §§9-503 and 9-504) which are set forth in Appendix D at p. App. 5.

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[1] This section was amended by P.A. 78-491, effective October 1, 1973. The amendment does not affect the issues presented in this action and the statute as amended is set forth in the Appendix.

[2] This section was amended by P.A. 77-2810, effective July 1, 1973 and P.A. 78-238, effective August 7, 1973. The amendments do not affect the issues presented in this action and the statute as amended is set forth in the Appendix.

QUESTIONS PRESENTED

1. Whether a substantial constitutional claim is presented against a state official, the Secretary of State, giving this Court jurisdiction on direct appeal to review the district court's dismissal of the action for mootness and lack of standing where the claim is for declaratory and injunctive relief against the enforcement of state statutes by the Secretary of State?

2. Whether plaintiff lacks standing to contest the constitutionality of statutes that allow the taking of his property without prior notice and hearing on the ground that the taking complained of was unlawful and therefore relievable by an action for conversion?

3. Whether this action is rendered moot because the complained of repossession has already taken place and the subject automobile sold and title transferred, where relief requested included a declaratory judgment and an injunction.

STATEMENT OF THE CASE

1. Alfredo Gonzalez brought this action under 28 U.S.C. §§1331, 1343(3) and (4) and 42 U.S.C. §1983 challenging the constitutionality of the automobile repossession and resale provisions of the Illinois Commercial Code, Ill.Rev. Stat. ch. 26, §§9-503 and 9-504, and those provisions of the Illinois Motor Vehicle Code, Ill.Rev. Stat. ch. 95½, §§3-114(b), 3-116(b) and 3-612, permitting, authorizing, and compelling the transfer of titles to repossessors or their nominees after a repossession and authorizing the issuance of special license plates to those in the business of repos-

sessing automobiles.[3] Gonzalez complains that the defendant Mercantile National Bank (hereinafter Mercantile or the bank or creditor) violated the rights secured to him under the due process and equal protection clauses of the Fourteenth Amendment by seizing, taking possession of, and selling his automobile, under color of law, without prior notice to him, without an opportunity for him to be heard regarding his claims to possession of his automobile and without a judicial or other third party determination of the validity or probably validity of the creditor's claim to possession. Gonzalez further complains that the defendant Secretary of State of Illinois (hereinafter Secretary) violated the rights secured to him under the due process and equal protection clauses of the Fourteenth Amendment by transferring title to his automobile to defendant Mercantile without prior notice to him, without an opportunity for him to be heard regarding his claims to title of his automobile and without a judicial or other third party determination of the validity or probable validity of the Secretary's right to terminate his title to and registration of the automobile and transfer the title to the creditor.

[3] This action was originally brought only by Hermogenes Mojica against his creditor, Automatic Employees Credit Union and the Secretary of State on March 16, 1972. (A. 7) Mr. Gonzalez entered the action as a named plaintiff by way of an amended complaint on September 28, 1972, along with two other additional plaintiffs, James Barnett and Compton C. Banks. (A. 23) The amended complaint named four other creditor defendants, Mercantile National Bank of Chicago (Gonzalez' creditor), Car Credit Corp., Overland Bond and Investment Corp. (Barnett's creditors) and Wood Acceptance Corp. (Banks' creditor). Only Gonzalez has appealed this action.

Count I of the amended complaint was brought against the creditors, as a plaintiffs' and defendants' class action,[4] praying that the repossession provisions of the Illinois Commercial Code be declared unconstitutional and that the creditors be enjoined from the continued repossession and selling of automobiles under the authority of these laws.

Count II, filed as a plaintiffs' class action,[5] prayed that the title transfer provisions of the Illinois Motor Vehicle Code, which are administered and executed by the Secretary, be declared unconstitutional and that the court

> Enter preliminary and permanent injunctions, enjoining defendant, Secretary, his successors in office, agents and employees, and all other persons in active concert and participation with him from transfering title and issuing a new certificate of title to a transferee after an involuntary repossession and from issuing special repossession plates to those in the business of repossessing motor vehicles pursuant to the authority of these statutes on the grounds that said procedures deprive the plaintiff of the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (A. 34)

Since an injunction was sought to enjoin a state official, the Secretary of State, from enforcing or executing state statutes of state-wide application, a three-judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284. (A. 23) The three-judge district court assumed pendant jurisdiction over the entire action.

[4] The original complaint did not bring Count I as either a plaintiffs' or defendants' class action.

[5] Count II of the original complaint was filed as a plaintiffs' class action.

Count IV of the amended complaint sought monetary damages for injuries sustained by Gonzalez as the result of Mercantile's deprivation, under color of law, of rights secured to him under the Constitution.[6] Subsequent to the dismissal of this action by the district court, Gonzalez and Mercantile stipulated that if Gonzalez should prevail on his damage claim against Mercantile, Count IV, the amount of the damages awarded would not exceed $750. (A. 54) As noted in the motion of Mercantile National Bank to dismiss the appeal, subsequent to the filing of the Jurisdictional Statement, Mercantile paid the full $750 to Gonzalez and Count IV is no longer a part of this appeal.

2. Gonzalez purchased an automobile under a retail installment sales contract that gave the holder of the contract all "the rights and remedies provided by Article 9 of the Illinois Uniform Commercial Code." Article 9 includes the right to repossess without notice or hearing upon the unilateral determination of default by a creditor. (A. 37) Mercantile repossessed the automobile upon its unilateral determination of default. In the amended complaint, Gonzalez alleges facts that, taken at face value, lead to the conclusion that he was not in default at the time of repossession and that Mercantile was not entitled to possession of the automobile. (A. 26) Mercantile filed an answer contesting some of the factual allegations pleaded by Gonzalez. (A. 43) The district court determined that Gonzalez was not in default at the time of repossession. 363 F.Supp. at 145, Jurisdictional Statement, p. 3a.

On application by Mercantile subsequent to its repossession, the Secretary of State terminated Gonzalez' certifi-

[6] Counts III, V and VI were similar individual damage actions by the other plaintiffs against their creditors.

cate of title and issued a new one in the name of Mercantile National Bank. (A. 49)[7]

On June 21, 1972, the original plaintiff, Mojica, moved for a temporary restraining order against the Secretary of State to prohibit him from transferring titles and issuing new certificates of title after such repossessions until each owner-debtor had been given a hearing before an impartial and neutral trier of fact on the question of whether his creditor had the right to repossess and sell the automobile in question and whether the Secretary had the right to transfer title and issue a new certificate of title to the automobile. (A. 16) In order to avoid the issuance of a temporary restraining order, the Secretary adopted new office procedures that require creditors to send debtors a notice of intent to transfer title, giving debtors an opportunity to send in an affidavit of defense. In order to obtain transfer of title the creditor has to state that he has sent his debtor such a notice of intent and that his debtor has not sent him back a valid affidavit of defense. The affidavit is returned to the creditor, not the Secretary. (A. 19)

The three-judge district court dismissed the action on the grounds that Gonzalez lacked standing to contest the lack of a due process hearing prior to the seizing of his property and transfer of his title. The court below so held because the pleaded facts showed that plaintiff had an action for conversion and, secondarily, that the action was moot because Gonzalez' automobile had already been sold and title to it transferred. Gonzalez appealed directly to this Court from that judgment. On February 25, 1974, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits.

[7] At the time of this action by the Secretary, Gonzalez was a member of the plaintiffs' class as pleaded in Count II of the original complaint.

SUMMARY OF ARGUMENT

I. Jurisdiction

This action was brought against a state official, the Secretary of State, to enjoin him from enforcing the transfer of title provisions of the Illinois Motor Vehicle Code, a statute of statewide application. A three-judge district court was convened pursuant to 28 U.S.C. §2281. This Court has jurisdiction over all issues raised by a direct appeal from a three judge court, including such matters as standing, as long as the three-judge court was properly convened. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 31 L.Ed. 2d 424 (1972); *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968).

The main issue concerning the propriety of convening the three-judge court in this case is whether the complaint raised a substantial constitutional question. This case—asks whether statutes that permit the involuntary termination and transfer of a certificate of title to an automobile without prior notice or hearing by the Secretary of State constitute a constitutionally impermissable denial of due process rights guaranteed by the Fourteenth Amendment. That question involves substantial constitutional rights and has not been settled by this Court. "[C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous." *Goosby* v. *Osser*, 409 U.S. 512, 35 L.Ed.2d 36, (1973); *Hagens* v. *Lavine*, ... U.S. ....., 42 U.S.L.W. 4381 (Mar. 25, 1974). Decisions of this Court indicate the seriousness and substance of this complaint under the due process clause of the Fourteenth Amendment. *Bell* v. *Burson*, 402 U.S. 535, 29 L.Ed.2d 90 (1971) (automobile registrations and drivers' licenses), *Fuentes* v. *Shevin*,

407 U.S. 67, 32 L.Ed.2d 556 (1972) (prejudgment replevin), *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349 (1969) (prejudgment garnishment).

Furthermore the Secretary performs his unconstitutional acts in conjunction with and in enforcement of a prior deprivation of due process; the repossession of an automobile by a private creditor without notice or hearing. State involvement in the challenged repossession scheme is substantial and essential to its efficacy. Specifically:

a. The Illinois Secretary of State issues special license plates to repossessors.

b. The Secretary transfers title to repossessors upon their statement, without notice or hearing prior to repossession and without a hearing prior to title transfer. Repossession is legally useless without a title transfer since a car cannot be sold in Illinois by one who does not hold or otherwise control its title.

c. No other person in Illinois is permitted to perform the functions of the Secretary just described. The Secretary has complete control over the issuance, termination and transfer of certificates of title to automobiles.

d. The Secretary is free to enforce due process requirements of notice and hearing before repossession and title transfer. That this is so is shown by the Secretary's actions to avoid a temporary restraining order. (A. 19) He changed his office procedures to require repossessors to notify debtors of an impending title transfer and to give them an opportunity to file an affidavit of defense (which, however, the repossessor is permitted to evaluate on his own). The Secretary thus clearly retains considerable discretionary control over his enforcement of the challenged statutes.

e. Repossession is the only circumstance in which the Secretary transfers title without meeting the due process requirements of notice and hearing. Indeed, such notice and hearing are required in all other Illinois title termination proceedings. Ill.Rev.Stat. ch. 95½, §2-118. See also *Bell* v. *Burson,* 402 U.S. 535, 29 L.Ed.2d 90 (1971) (automobile registrations and drivers' licenses). This invidious, arbitrary and irrational classification is inconsistent with the guarantee of equal protection secured by the Fourteenth Amendment.

State involvement in a constitutionally questionable statutory scheme is thus alleged and it was therefore proper to convene a three-judge court to determine whether equitable relief should be granted against the state official. Once a three-judge court is properly convened, other inextricably related defendants may be properly brought before it within the court's pendant jurisdiction. *Lake Carriers' Assn.* v. *MacMullen,* 406 U.S. 498, 32 L.Ed. 2d 297 (1972). Once within the pendant jurisdiction of the court below, defendants are also within the jurisdiction of this Court.

Plaintiff further challenges a statutory scheme, the repossession of automobiles under the Illinois Commercial Code, that is enforced by a state official but that is employed by the other defendants, private creditors. The scheme requires the active participation of both the state official and the private creditors. The Secretary of State, for example, only transfers title from a debtor to a creditor-repossessor upon the application of the latter after repossession has taken place, usually in the above described unconstitutional manner. This is state action even though the Secretary enforces unconstitutional action

that is initiated by a private creditor. *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed. 1161 (1948); *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 23 L.Ed.2d 349 (1969).

The pendant claim against the private creditor defendants raises a constitutional question that is similar to the substantial one raised by the main claim against the Secretary of State. The question is whether the denial of due process notice and hearing by private creditors under state repossession laws that require state enforcement constitutes an unconstitutional denial of due process under color of state law, i.e., by state action. Color of law is established by the Secretary's actions in issuing repossession plates and transferring titles as well as by a scheme of state statutes thoroughly regulating and encouraging the repossession industry and practice. *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451. 96 L.Ed. 1068 (1952); *Burton* v. *Wilmington Parking Garage,* 365 U.S. 715, 6 L.Ed.2d 45 (1961); *Reitman* v. *Mulkey,* 387 U.S. 369, 18 L.Ed.2d 830 (1967).

Since lower courts have split on this question and this Court has not spoken to it, a substantial constitutional claim is clearly unresolved by prior decisions of this Court. That claim is thus of sufficient magnitude to come within the pendant jurisdiction of a three judge court.

The three judge court dismissed the action as to all defendants on the grounds of mootness and lack of standing. These grounds were equally applicable in the lower court's opinion to all defendants; it would be wasteful to require those questions to be litigated twice simultaneously before two different appellate courts.

II. Standing

Plaintiff has standing to sue to redress an actual injury which he sustained when his constitutional right to due process was violated. The facts of the actual injury, i.e., the automobile repossession and transfer of title are not disputed.

Nevertheless, the court below held that plaintiff lacked standing because the repossession complained of was unlawful. The court thus missed the entire point of the due process clause. Had it been possible to challenge the proposed repossession—had there been prior notice and a hearing—the repossession might never have occurred. Plaintiff suffered injury—the repossession—directly because of the denial to him of his constitutionally protected right to due process of law. *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972).

The fact that plaintiff may have a cause of action for conversion, which the court below thought dispositive of the standing issue, actually has no bearing on plaintiff's standing to sue for a hearing that might have prevented that conversion. *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed. 2d 556 (1972). "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 80.

III. Mootness

This action is not moot for three reasons. First, it complains of a practice that is capable of repetition and likely to be repeated. The action is thus a continuing controversy amenable to declaratory and injunctive relief. *Super Tire Engineering Co.* v. *McCorkle,* ..... U.S. ....., 42 U.S.

L.W. 4507 (Apr. 16, 1974); *Roe* v. *Wade,* 410 U.S. 113, 35 L.Ed.2d 147 (1973). (Injunctive relief was requested against future repossessions and title transfers, not against the already accomplished seizure and resale of plaintiff's automobile as the lower court mistakenly assumed.) Second, the Secretary is in no way constrained from returning to his old ways once this litigation is terminated. See *Bus Employees* v. *Missouri,* 374 U.S. 74, 10 L.Ed.2d 763 (1963). A slight improvement in his office procedure was instituted only to avoid a temporary restraining order and is mandated by no statute, regulation or admission of past illegality. The present procedure can be changed without even a public notice, let alone an administrative hearing. Third, this action is a class action seeking relief for all those similarly situated. As such, it represents a continuing controversy even if the complaint of the one named plaintiff were resolved, which it is not. See *DeFunis* v. *Odegaard,* ..... U.S. ....., 42 U.S.L.W. 4578 (Apr. 23, 1974); *Brockington* v. *Rhodes,* 396 U.S. 41, 24 L.Ed.2d 209 (1969).

Under the three rules of mootness alluded to above, this Court has found the following actions viable, *inter alia:* a complaint against anti-abortion laws heard after termination of the pregnancies in question, *Roe* v. *Wade,* 410 U.S. 113, 35 L.Ed.2d 147 (1973); *Doe* v. *Bolton,* 410 U.S. 179, 35 L.Ed.2d 201 (1973); a complaint against segregated bus travel brought after the termination of the ride and brought by a plaintiff who had no intention of returning to the bus line complained of, *Evers* v. *Dwyer,* 358 U.S. 202, 3 L.Ed.2d 222 (1958); complaints against election practices filed after the elections in question had been held, *Moore* v. *Ogilvie,* 394 U.S. 814, 23 L.Ed.2d 1 (1969); *Gray* v. *Sanders,* 372 U.S. 368, 9 L.Ed.2d 821 (1963).

Finally, the action is not mooted by the resolution of its damage claim since the constitutional claims of the complaint remain unsettled.

ARGUMENT

I.

THIS COURT HAS JURISDICTION OF THIS DIRECT APPEAL FROM THE THREE-JUDGE COURT

A. When A Three-Judge District Court Is Properly Convened, This Court Has Jurisdiction Over Its Judgment Denying Injunctive Relief.

The three-judge district court dismissed this action, and thereby denied injunctive relief, on the grounds that the plaintiffs lacked standing and were not entitled to injunctive relief. Mercantile first argues that this Court has direct appellate jurisdiction over judgments of three-judge courts only when the decisions are on constitutional grounds and on the merits. This contention has been totally and explicitly rejected by this Court and the issue completely foreclosed. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541, 31 L.Ed.2d 424 (1972); *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968).

When an application for a statutory three-judge court is made, the single judge's inquiry is limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief and whether the case presented otherwise comes within the requirements of the three-judge statute. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 8 L.Ed.2d 794 (1962). Once the three judge court is convened "the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." *United States* v. *Georgia Public Service Commission*, 371 U.S. 285, 287, 9 L.Ed.2d 317 (1963).

Thus, this Court has reviewed on direct appeal decisions of three-judge district courts dismissing a case for lack of standing (*Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947, 1968); lack of subject matter jurisdiction under 28 U.S.C. §1343(3) (*Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 31 L.Ed.2d 424, 1972); *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962); and under the doctrine of abstention (*American Trial Lawyers Ass'n* v. *New Jersey Supreme Court*, 409 U.S. 467, 34 L.Ed.2d 651, 1973); *Zwickler* v. *Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967).

The complaint in this case requested the issuance of an injunction against a state officer enjoining him from enforcing state statutes of state-wide application on the grounds that said statutes violate the Due Process and Equal Protection clauses of the Fourteenth Amendment and, as we shall show in subheading B below, the constitutional question raised is substantial. The criteria for the convening of a three-judge court were clearly met and the court was properly convened.

B. A Substantial Constitutional Claim Was Alleged Against The Secretary Of State.

A three-judge court is required to be convened under 28 U.S.C. §2281 when there is a substantial constitutional attack upon a state statute. The standards to be applied in determining whether a claim is so insubstantial as to preclude the convening of a three-judge court were summarized in two recent decisions, *Goosby* v. *Osser*, 409 U.S. 512, 518, 35 L.Ed.2d 36 (1973); *Hagans* v. *Lavine*, ... U.S. ....., 42 U.S.L.W. 4381, 4384 (March 25, 1974), as follows:

> 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious.' *Bailey* v. *Patterson*, 369 U.S. at 33; 'wholly

insubstantial,' ibid., 'obviously frivolous,' *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 285, 288 (1910); and 'obviously without merit.' *Ex parte Poresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if ' "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' *Ex parte Poresky, supra*, at 32, quoting from *Hannis Distilling Co.* v. *Baltimore, supra*, at 288; see also *Levering & Garriquest Co.* v. *Morrin*, 289 U.S. 103, 105-106 (1933); *McGilvra* v. *Ross*, 215 U.S. 70, 80 (1909).

Under this standard, Gonzalez presented a substantial constitutional claim against the Secretary of State.

1. The issuance and transfer of certificates of title in Illinois is completely controlled by the Secretary of State. Without a certificate of title issued by the Secretary, an automobile cannot be registered and license plates cannot be issued. (Ill.Rev. Stat. ch. 95½, §3-101(b)) Without registration and license plates, the issuance of which are also controlled by the Secretary, an automobile cannot be lawfully driven. Upon the termination or transfer of a certificate of title, the registration and license plates of the former owner are cancelled and new ones are issued by the Secretary to the subsequent owner. (Ill.Rev.Stat. ch. 95½, §§3-501 and 3-502).

The Secretary's action in transferring title is not conclusive as to ownership, but it does create *prima facie* rights of ownership and liens. (Ill.Rev.Stat. ch. 95½, §3-107(c))

Once issued, a certificate of title, registration and license plates give their holder the right to use of the registered property and provide substantial state protection against encroachment on his rights to title, possession and use of the property. The certificate of title and everything dependent thereon are issued by the Secretary and can only be terminated by the Secretary.

In this case, we are directly challenging the constitutionality of provisions of the Illinois Motor Vehicle Code that permit title transfers without a hearing. Since the Secretary is the only person or official who can enforce and execute the challenged statutes, the cases cited by Mercantile, *Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573 83 L.Ed. 994 (1939) and *Moody* v. *Flowers*, 387 U.S. 97, 18 L.Ed. 2d 643 (1967), are inapposite to this proceeding. Here the state officer, the Secretary, is the only means of enforcement or execution of the challenged statutory provisions.

Thus the title transfer provisions of the Illinois Motor Vehicle Code raise substantial constitutional questions that mandate the convening of a three-judge court in an action to enjoin the Secretary from enforcing said statutes. Among the rights guaranteed by the Constitution, this Court has clearly considered the right of procedural due process to be one of the most basic and inviolable. There can be no doubt that the procedure just described violates procedural due process. Mr. Justice Jackson put the matter quite simply in *Mullane* v. *Central Hanover Trust Company*, 339 U.S. 306, 313, 94 L.Ed 865 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

This Court has swiftly struck down procedures which have failed to provide proper notice and hearing to individuals for protecting their rights: *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 419, 59 L.Ed. 1027 (1915): "It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation and which yet accorded no hearing . . . could . . . hardly be termed 'Due Process of Law';" *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437, 27 L.Ed. 2d 515 (1971): "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."

In *Bell* v. *Burson,* 402 U.S. 535, 29 L.Ed.2d 90 (1971) this Court held that the suspension of issued motor vehicle registrations and drivers licenses is a state action that adjudicates important interests of the holders. Therefore, registrations and licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. Similarly to automobile registrations, state-issued certificates of title offer substantial protection against the deprivation of property interest in an automobile. Termination of said certificate by the state therefore requires a prior due process hearing.

2. When considered in conjunction with the repossession provisions of the Illinois Commercial Code, the statutory scheme permitting the termination and transfer of

title without a hearing—unconstitutional by itself—also enforces a prior physical taking of property without due process.

It is no defense to say that the title transfer provisions in question are only applied after the repossession of an automobile by a private creditor. The deprivation of constitutional rights by a state is forbidden where state action enforces privately originated discrimination that could not be sustained without such state action. *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed 1161 (1948); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 32 L.Ed.2d 627 (1972).

In the Illinois statutory scheme for motor vehicle repossession, the Secretary plays a central and necessary role. A repossessor would have a meaningless remedy if he could not resell the repossessed automobile. Unless the Secretary terminates the prior owner's certificate of title, registration and license plates and then issues a new certificate of title to the repossessor, a subsequent purchaser would not be able to register or lawfully drive the car. Since automobiles are normally purchased to be lawfully driven, the Secretary's certificate of title procedures are absolutely necessary in order to allow the repossessor to resell the car. The Secretary and the statutes he executes are thus integral, vital and indispensible parts of the repossession sequence. These statutes authorize the cancellation of a certificate of title without opportunity to be heard.

The requirement of procedural due process has been consistently applied by this Court to state activity in the economic area without regard to whether the state acted directly or enforced privately originated deprivation of property. In *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972), this Court struck down prejudgment replevin laws

of Florida and Pennsylvania which authorized the summary seizure of goods and chattels by state agents under a writ of replevin. Both statutes provided for the issuance of the writ simply upon the *ex parte* application of another person who claimed a right to them and posted a security bond. In both cases, three-judge courts were convened because an injunction was sought to prevent a state official from enforcing the statutes. The creditors in both instances sought to retake merchandise pursuant to conditional sales contracts. This Court held that the statutes permitting repossession without a hearing and the actions of the state officials to enforce them violated the Fourteenth Amendment's guarantee of due process of law. In so holding this Court explicitly recognized that the impetus for the constitutional deprivation at issue came from private creditors and that state officials exercised no discretion over the matter. As this Court held:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark. (407 U.S. at 93)

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349 (1969) this Court held that the Wisconsin prejudgment garnishment procedure, whereby wages were frozen pending final determination of a lawsuit, violated due process because the garnishment was enforced without notice or an opportunity to be heard. The procedure to

enforce a prejudgment garnishment in Wisconsin was "that the Clerk of the Court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen." (395 U.S. at 338) The activity of the state official was ministerial and nondiscretionary at the request of the private creditor.

Almost identically, the Illinois statutory scheme at bar allows the Secretary to transfer title, issue a new certificate of title, register a car with a new owner and issue license plates to the new owner merely upon the receipt of "an affidavit made by or on behalf of the lien holder that the vehicle was repossessed and that the interests of the owner was lawfully terminated or sold pursuant to the terms of the security agreement." (Ill.Rev.Stat. ch. 95½, §3-114(b)) The Secretary does not go behind the creditor's representations. The Secretary acts on the direction of the private creditor without further process. This is state action as defined under the Fourteenth Amendment and a violation of due process thereunder. It is immaterial whether the Secretary affirmatively and actively deprives a person of his property interest by terminating a certificate of title or whether the Secretary enforces the activity of a private creditor who has repossessed an automobile without notice of hearing.

Although several other lower courts have considered challenges to the repossession provisions of the commercial code, in only two cases was the state title officer named as a party defendant and a three-judge court requested. In *Michaelson* v. *Walter Lave, Inc.*, 336 F.Supp. 296 (E.D. Wisc. 1972) a three-judge court was convened. In *Gibbs* v. *Titelman*, No. 72-2165 (E.D.Pa. Nov. 21, 1972) (opinion reprinted at page app. 11 of Mercantile's Motion to Dis-

miss the Appeal) the plaintiffs' petition for a three-judge court was denied. The *Gibbs* case is distinguishable from the case at bar because the complaint in *Gibbs* was extremely vague on the role of a state official in the repossession process. As the court noted in its opinion, the complaint did not even mention the statute under which the state official is empowered to act. The *Gibbs* complaint only assailed those statutes prescribing a right of summary repossession. By contrast in the present case plaintiffs have specifically pleaded the role of the Secretary and the specific statutory provisions under the acts. It is those provisions that we prayed by declared unconstitutional and the Secretary be enjoined from enforcing.

In further distinction from *Gibbs*, a subsequent order therein (January 9, 1973) allowed the Commonwealth of Pennsylvania to intervene as a party plaintiff. This intervention by Pennsylvania on the side of and in support of the plaintiff debtors rendered the defendant state official a nominal and nonadversary defendant.

The jurisdictional question pending before this Court is whether a substantial constitutional question is presented against the Secretary of State. A finding of insubstantiability is warranted only when the issue is totally foreclosed by decisions of this Court. The unbroken chain of decisions of this Court, *Shelley* v. *Kraemer, Sniadach* v. *Family Finance, Bell* v. *Burson* and *Fuentes* v. *Shevin*, leaves no doubt that a substantial constitutional question is alleged in this case against the Illinois Secretary of State. The convening of a three judge court was therefore mandatory and this appeal is proper.

3. Mercantile argues that the Secretary is a nominal defendant because his function consists of a "mere ministerial act". The factual record in this case completely undermines that argument. Not only does the Secretary have discretion, he has partially exercised it.

At the time this action was filed, the Secretary's procedure for the transfer of title after a repossession was that the creditor would send in a form which stated simply that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to terms of a security agreement. In order to avoid the issuance of a temporary restraining order in this case (A. 19) the Secretary has since amended this form to require that the creditor also state that he has sent the debtor a notice of intent to transfer title and that the debtor has not sent back an affidavit of defense. (A. 18-21)

But due process requirements have still not been met. The Secretary did not specify the form of notice to be sent by the creditor or the form of affidavit of defense to be filed by the debtor. The creditor retains complete discretion as to the form and content of his notice and the suggested form of the affidavits of defense. How restrictive or broad these forms will be depend entirely on the predilection of the individual creditor.[8]

In a similar situation Illinois has specified by statute the exact form of notice of wage assignment and affidavit of defense. Before a wage assignment may be exercised, a creditor must send his alleged debtor a statutorily pre-

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[8] The form subsequently adopted by Mercantile, not a part of the record, is attached hereto as Appendix F for purposes of illustration. It is significant that if the Secretary's procedural change would have been effectuated prior to the transfer of Gonzalez' title it still would not have benefited him because of the notice now sent by Mercantile. Gonzalez admittedly had not made all of his payments, but had a dispute with Mercantile over an insurance rebate and at the time of the repossession Mercantile had received more than the total amount due them at that time. (A. 27) The bank however applied the rebated sum to the final payments (A. 43) and repossessed the car for nonpayment.

scribed notice of intent to exercise the wage assignment.[9] The affidavit of defense in response is also statutorily prescribed.[10]

The affidavit of defense to a transfer of title is presently sent to the creditor, not the Secretary. The creditor then has sole discretion to determine if the affidavit is valid. If the creditor rejects the affidavit, he applies for transfer and says he has not received a valid affidavit. The state thus abdicates effective control over its power and acts largely in the dark. *Fuentes* v. *Shevin*, 407 U.S. 67, 32

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[9] The notice must be in substantially the following form:

"You are hereby notified that the undersigned intends to make demand upon your employer upon a wage assignment executed by you on the ..... day of ....., 19 ...., to secure a debt contracted on the ..... day of ....., 19 ...., in the amount of $..... on which $..... has been paid. The terms of the contract are: (explain the terms and duration of the contract). You are now in default on such debt in the amount of $....., the last payment having been made on the ..... day of ....., 19 .....

Within 20 days after receiving this notice you must notify your employer and the creditor, in writing and under oath, of any defenses you may have to the wage assignment. In the event a false defense is made you will be subject to payment of attorneys fees, court costs and other expenses." (Ill.Rev.Stat. ch. 48, §39.2b)

[10] "I ....., hereby (swear) (affirm) that I have a bona fide defense to the claim of ....., which claim is based on a debt contracted on the ..... day of ....., 19 ...., and for security on which debt a wage assignment was executed." (Ill.Rev.Stat. ch. 48, §39.4a)

In this case, Gonzalez could have unquestionably and legitimately signed such an affidavit.

L.Ed.2d 556 (1972). If the Secretary may, by office procedural change, require a notice of attempt to transfer title and an opportunity to file an affidavit of defense, then he may also prescribe by rule the form and requirements of the notice and affidavit. Indeed, under *Fuentes*, he must.

4. Significantly, the State of Illinois recently recognized that holders of certificates of title to automobiles are entitled to due process protection before the certificate may be terminated, in every circumstance but the one at bar, and that it is the Secretary of State who must provide the proper hearing. The only exception to this new rule is where the certificate of title is terminated after a repossession. Ill.Rev.Stat. ch. 95½, §2-118, as amended effective August 13, 1973 provides:

> (a) Upon the suspension, revocation or denial of the issuance of a license, permit or registration or certificate of title under this Act of any person the Secretary of State shall immediately notify such person in writing and upon his written request shall, within 20 days after receipt thereof, set a date for a hearing and afford him an opportunity for a hearing as early as practical, in either the County of Sangamon or the County of Cook as such person may specify, unless both parties agree that such hearing may be held in some other county.
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> • • •
>
> (c) Upon any such hearing, the Secretary of State, or his authorized agent may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books and records and may require an examination of such person. Upon any such hearing, the Secretary of State shall either rescind or, good cause appearing therefor, continue, change or extend the Order of Revocation or Suspension, as the case may be.

> (d) All hearings and hearing procedures shall comply with the requirements of the Constitution, so that no person is deprived of due process of law nor denied equal protection of the laws. All hearings shall be held before the Secretary of State or before such persons as may be designated by the Secretary of State and appropriate records of such hearings shall be kept. Where a transcript of the hearing is taken, the person requesting the hearing shall have the opportunity to order a copy thereof at his own expense.
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> • • •

One of the statutes challenged in this action, Ill.Rev. Stat. ch. 95½, §3-114(b), creates an exception to the statute quoted above by allowing the Secretary to transfer title after a repossession upon receipt of an affidavit by or on behalf of a lien holder and without notice to or a hearing for the debtor.

By granting due process protection[11] in all cases of terminations of certificates of title except cases involving a repossession, the State has created an invidious and arbitrary classification which bears no rational relationship to a legitimate state interest. Section 3-114(b) thereby violates the equal protection clause of the Fourteenth Amendment. *Weber* v. *Aetna Casualty Insurance Co.*, 406 U.S. 164, 172, 31 L.Ed.2d 768 (1972); *Reed* v. *Reed*, 404 U.S. 71, 75, 30 L.Ed.2d 225 (1971); *Morey* v. *Doud*, 354 U.S. 457, 465, 1 L.Ed.2d 1485 (1957).

Furthermore, section 2-118 makes frivolous the claims that certificates of title are not worthy of due process protection and that the Secretary is a nominal defendant whose "involvement consists only of the 'mere ministerial act' of recognizing a transfer which has already taken place" (motion of Mercantile to dismiss appeal, p. 10).

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[11] Actually §2-118 itself may violate due process in that the statute may be interpreted to provide a hearing only after the fact of termination and not before.

C. The Claim Against Mercantile Was Properly Within The Pendant Jurisdiction Of The Three-Judge Court And Therefore This Court Has Jurisdiction Over That Portion Of This Appeal.

1. The claims are inextricably interrelated.

In the court below, plaintiff requested a declaratory judgment that the repossession provisions of the Illinois Commercial Code (Ill.Rev.Stat. ch. 26, §§9-503 and 9-504) were unconstitutional. They sought an injunction against Mercantile and the defendant-creditor class to prevent them from repossessing and selling automobiles pursuant to those unconstitutional statutes. This claim does not by itself require the convening of a three-judge court or permit a direct appeal to this Court.

However, plaintiffs claim against the private creditors was combined with their claim against the Secretary. The latter required the convening of a three-judge court. When a proper three-judge court claim is presented, that court may assume pendant jurisdiction over all related claims. *Lake Carriers' Assn.* v. *MacMullen*, 406 U.S. 498, 504, 32 L.Ed.2d 297 (1972); *Zemel* v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179 (1965). On appeal from a final disposition of such a case, this Court can properly assume jurisdiction over the entire appeal and render a decision on all questions involved, even those that would not by themselves justify the convening of a three-judge court or a direct appeal. *Roe* v. *Wade*, 410 U.S. 113, 123, 35 L.Ed.2d 147 (1973); *Zemel* v. *Rusk*.

The main criteria for pendant jurisdiction both here and before the three-judge court are judicial economy and the similarity or relatedness of the questions presented. In this case the three-judge court dismissed the case

against the Secretary and the creditors for the same two reasons, mootness and lack of standing. The arguments on these points are necessarily similar as to both defendants. It would be destructive of time and energy for all concerned if these questions had to be simultaneously appealed to two different courts. See *Roe* v. *Wade*, 410 U.S. at 123, 35 L.Ed.2d at 160.

The challenges to the repossession laws of the Illinois Commercial Code, to the title transfer provisions of the Illinois Motor Vehicle Code and to the authorization of repossession plates in the Illinois Motor Vehicle Code together constitute a single challenge to a complete statutory scheme. Here is the sequential interrelationship of the challenged statutes:

a. The creditor repossesses the automobile under §9-503 of the Commercial Code; then

b. The Secretary issues repossession license plates to the creditor-repossessor allowing the latter to operate the vehicle under §3-612 of the Motor Vehicle Code; then

c. The Secretary issues a new certificate of title in the name of the creditor under §§3-114(b) and 3-116(b) of the Motor Vehicle Code; and finally

d. The creditor, having good title, sells the automobile to a third person under §9-504 of the Commercial Code.[12]

[12] The sequence of steps c and d may be reversed so the creditor sells the automobile first and the Secretary issues the new certificate of title in the name of the purchaser on application of the repossessor. In this case, the procedure set forth in the text was followed and Mercantile took title in its own name. (A. 49)

The relatedness of the claims against the Secretary and Mercantile is clear from this sequence. The challenged statutes were designed to work together and they are used together. Use of repossession plates and transfer of title under the Motor Vehicle Code do not occur until there has been a repossession under the Commercial Code. A repossession sale under the Commercial Code is impossible unless the Secretary transfers title to the repossessor and/or subsequent purchaser under the Motor Vehicle Code.

This combination of statutes is utterly distinguishable from the duplicate coverage of state and municipal criminal provisions against the same acts. In that instance, constitutional challenges to each are considered individually without reference to the other; the two laws have no effect on each other. A three-judge court would have no jurisdiction over a challenge to such an ordinance nor would a direct appeal lie to this Court. *Perez* v. *Ledesma*, 401 U.S. 82, 86, 26 L.Ed.2d 701 (1971).

The non-duplicative interrelatedness of the statutes at issue in this case gives this Court jurisdiction over the entire appeal before it.

2. The pendant claim raises a substantial constitutional claim.

Since the sole attack on the repossession statutes is a constitutional one, that challenge must be substantial to give the three-judge court even pendant jurisdiction. The standards to be applied in determining whether this claim is so insubstantial as to preclude federal jurisdiction are the same as applied when determining if a three-judge court should be convened: "essentially fictitious", "wholly insubstantial", "obviously frivolous", "obviously

without merit", and totally foreclosed by previous decisions of this Court. *Hagans* v. *Lavine*, ... U.S ....., 42 U.S.L.W. 4381 (Mar. 25, 1974); see p. 15 above.

Under §9-503 of the Illinois Commercial Code, a secured party has the right to take possession of collateral without judicial process in the event of default. Whether or not a default has occurred is determined solely by the creditor. After that unilateral determination the debtor's property is taken, without notice or hearing, under §9-503, and then sold by the creditor under §9-504. At no time during this process does the debtor have an opportunity to be heard regarding his claim to possession of his automobile. At no point in this process is there a judicial or third party determination of the validity or probable validity of the creditor's claim that the debtor is in default.

Under *Sniadach* and *Fuentes* there is no doubt that this procedure deprives the debtor of due process. "[D]ue process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property. . . . ." *Fuentes* v. *Shevin*, 407 U.S. at 97, 32 L.Ed.2d at 579; *Sniadach* v. *Family Finance Corp.*, 395 U.S. at 343, 23 L.Ed.2d at 355 (Harlan, J., concurring). "[D]ue process requires an opportunity for a hearing before a deprivation of property takes effect." *Fuentes* v. *Shevin*, 407 U.S. at 88, 32 L.Ed.2d at 474.

The only question left is whether this procedure is an unconstitutional deprivation of due process. Since the Fourteenth Amendment only prohibits denials of due process by states, the question is whether the denial of due process by a creditor conducting a §9-503 repossession constitutes state action, or, put another way, does the creditor act "under color of law."

The lower courts have split on the constitutionality of the repossession laws. Obviously, a substantial constitutional question remains in the absence of this Court's decision on that question. All of the lower court holdings that declared repossession laws constitutional, admittedly in the majority, have found state action lacking; no case has held that a repossession does not deny due process. In any event, since a finding of constitutional insubstantiality is warranted only if the issue is totally foreclosed by prior decisions of this Court (*Hagens* v. *Lavine*), we confine our discussion to decisions of this Court.

Mercantile acted under color of law in two ways. First, it acted in conjunction with a state official. Second, it acted pursuant to and under the authority of state statutes.

a. We have described above the necessary involvement of a state official with Mercantile. Unless the Secretary issues a new certificate of title, Mercantile cannot complete the repossession and sale process. The Secretary further directly aids repossessors by issuing special repossession license plates. A private person acting in conjunction with and with the aid and assistance of a state official is acting under color of law for purposes of the Fourteenth Amendment. The involvement of the state official provides the essential state action. *United States* v. *Price*, 383 U.S. 787, 16 L.Ed.2d 267 (1966); *Adickes* v. *Kress & Co.*, 398 U.S. 114, 26 L.Ed.2d 142 (1970).

Not only did the state official act in conjunction with Mercantile, he also provided a crucial element of the repossession and sale process, a transfer of title allowing the §9-504 sale. In *Shelley* v. *Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1948) this Court held that even when constitutional deprivations are defined by an agreement among private individuals, state enforcement of that agreement violates the Fourteenth Amendment. In *Shelley*, the state

enforced a prohibition against the sale of a parcel of land to a Negro, a so-called restrictive covenant. Here the state enforced a termination of an automobile owner's certificate of title to allow resale of the vehicle to a third party without the original owner's consent.

Sniadach was also limited to private parties. The question was whether a private creditor would be allowed to garnishee a debtor's wages prior to judgment and without notice. The clerk of the court had to issue a summons to establish the garnishment. This activity of the clerk added the necessary element of state action and the entire procedure was struck down.

b. If a state significantly involves itself with private deprivations of constitutional rights, then those private actions become actions of the state. So, when a state allows extensively regulated private parties to infringe the constitutional rights of other private parties, the infringement becomes state action. *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451, 462, 96 L.Ed. 1068 (1952); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 6 L.Ed.2d 45 (1961). When a state enacts laws allowing private persons to deprive others of their constitutional rights, such state encouragement and approval makes the deprivation state action. *Reitman* v. *Mulkey,* 387 U.S. 369, 18 L.Ed.2d 830 (1967).

Although these principles are easily stated, it is often difficult to draw a straight line separating unconstitutional conduct that is private from that which is "state action." "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority,* 365 U.S. at 722, 6 L.Ed.2d at 50; *Moose Lodge* v. *Irvis,* 407 U.S. 163, 172, 32 L.Ed.2d 627 (1972).

A sifting of the facts and weighing of the circumstances in this case reveals that Illinois' involvement with private automobile repossessions amounts to "state action" for three reasons: first, the state regulates the specific activity which is alleged to be unconstitutional; second, state statutes specifically allow, promote, and encourage the challenged private actions; and third, creditors act pursuant to state statutes in effectuating their repossessions.

The State of Illinois regulates the repossession process from before it begins to after the deed is done. In order to engage in the repossession of automobiles, a repossessor must be registered with and have a permit from the Illinois Commerce Commission. (Ill.Rev.Stat. ch. 95½, §3-612) After a repossession has taken place, the repossessed automobile may be operated only with special repossessor license plates that are issued by the Secretary of State. (Ill.Rev.Stat. ch. 95½, §3-612) The manner and effect of disposition of repossessed collateral is spelled out in detail by statute. (Ill.Rev.Stat. ch. 26, §9-504 and ch. 121½, §580.) Thus, as in *Public Utilities Commission* v. *Pollack,* the state has affirmatively approved the regulated practice and, as in *Burton,* has elected to place its power and prestige behind a nominally private deprivation of due process.

The regulation and licensing of repossessors is very different from the mere issuance of a liquor license discussed in *Moose Lodge.* There, Pennsylvania issued a liquor license to a lodge, but it did not approve or otherwise regulate the guest policies of the lodge and thus did not implicate the state in the discriminatory policies of the lodge so as to make those policies state action within the ambit of the Fourteenth Amendment. Furthermore, the

state performed its sole act in *Moose Lodge,* the issuance of a license, prior to the discrimination. In the case at bar, the state regulations and policies apply after the deprivation of due process. In fact, they enforce it.

By enacting §9-503 of the Commercial Code, the state specifically allowed, promoted, and encouraged nominally private deprivations of due process in the repossession of automobiles. The enactment of legislation allowing or encouraging deprivations of constitutionally protected rights so involves the state in those deprivations as to render them under color of law. In *Reitman* v. *Mulkey,* 387 U.S. 369, 18 L.Ed. 2d 830 (1967), a section of the California Constitution that prohibited the state from denying a private citizen the right to sell real estate to whomever he chose was held unconstitutional. This Court found that the provision served as state encouragement of private discrimination. Even though all parties to the suit were private individuals not connected with the state and no state official was involved, this Court held that the enactment of the provision constituted enough state involvement to bring acts of discrimination performed under it within the purview of the Fourteenth Amendment.

The security agreement between Gonzalez and Mercantile provides:

> Upon the occurrence of any event of default, . . . the parties shall have the rights and remedies provided by Article 9 of the Illinois Uniform Commercial Code including, but not by way of limitation, the rights of the holder (a) to take immediate possession of the motor vehicle, with or without judicial process, and for such purpose, to enter upon the premises where it may be located . . . (A. 38)

Thus not only does the state statute encourage repossession but the actual repossession in this case took place directly pursuant to said statute.

To argue, as Mercantile does, that because its contract states that upon default the parties shall have the rights and remedies provided by Article 9 of the Uniform Commercial Code, the exercise of those remedies is done pursuant to the contract and not to the statute is a sophistic begging of the question.

II.

GONZALEZ HAS STANDING TO REQUEST AN ADJUDICATION OF THE CONSTITUTIONALITY OF THE REPOSSESSION AND TITLE TRANSFER STATUTES.

The jurisdiction of a federal court is defined and limited by Article III of the Constitution, which restricts it to "cases" and "controversies". One aspect of the case and controversy requirement is standing, which is to be considered in the framework of Article III. *Data Processing Service* v. *Kamp,* 397 U.S. 150, 25 L.Ed 2d 184 (1970).

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204, 7 L.Ed.2d 663 (1962). The fundamental aspect of standing is that it focuses on the party bringing the action and not on the issues he wishes to have adjudicated. In other words, when standing is placed in issue the question is whether the plaintiff is a proper party to request an adjudication of the particular issue and not whether the issue itself is justiciable. *Flast* v. *Cohen,* 392 U.S. 83, 99, 20 L.Ed.2d 947 (1968)

There are two questions considered in the determination of standing. First is whether the plaintiff alleges that the interest sought to be protected by the plaintiff is arguably within the zone of interest to be protected by the statute or constitutional guarantee in question. Second, whether the interest sought to be protected by the plaintiff is arguably within the zone of interest to be protected by the statute or constitutional guarantee in question. *Data Processing Service* v. *Kamp,* 397 U.S. 150, 25 L.Ed. 2d 184 (1970); *Barlow* v. *Collins,* 397 U.S. 159, 167, 25 L.Ed.2d 192 (1970) (concurring opinion of Justice Brennan).

In this action, Gonzalez is challenging the constitutionality of those sections of the Illinois Commercial Code that allow creditors to seize possession of automobiles without a determination of the creditor's right to possession. He is also challenging the constitutionality of those sections of the Illinois Motor Vehicle Code that authorize the Secretary of State, after a repossession, to terminate the debtor's certificate of title and issue a new certificate to the creditor without a hearing to determine the creditor's right to title. The key facts are the repossession and transfer of title without notice and a hearing. Of these facts there is no dispute. Gonzalez' automobile was repossessed by Mercantile and his title transferred without notice and without an opportunity to be heard. (A. 49-51)

Gonzalez claims that the procedure authorized by statute and executed by Mercantile and the Secretary have deprived him of his constitutional right to a due process hearing prior to being deprived of his automobile and title thereto. It is clear that the challenged actions have caused Gonzalez injury in fact and that he seeks to protect an interest protected by the Constitution.

The district court, taking the allegations of the complaint at face value, determined that Gonzalez was not in default at the time his automobile was repossessed and that therefore defendant Mercantile was guilty of a conversion of plaintiff's property. The court below thereupon held that Gonzalez lacked standing to challenge the constitutionality of the repossession and transfer of title laws because if he was not actually in default, the taking was a conversion and not a lawful repossession. This decision is in direct conflict with the applicable decisions of this Court.

The unconstitutionality of Mercantile's and the Secretary's actions, and their liability therefor attach, if at all, at the moment of repossession and transfer without notice and hearing. No subsequent determination of the validity or invalidity of the repossession changes the unconstitutionality of the original acts.

In *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972) the plaintiffs sued for declaratory and injunctive relief against the continued enforcement of the Florida and Pennsylvania prejudgment replevin acts. In holding both acts unconstitutional, this Court noted that there was a dispute between Mrs. Fuentes and her creditor. This Court never determined whether Mrs. Fuentes was in default or whether the creditor ultimately had a right to possession of the goods. This Court dealt only with the fact that the original taking was without notice and hearing.

In its opinion, this Court explicitly held that the purpose of due process is to protect against unfair, mistaken and unlawful conversions of property, stating:

> "Its purpose [the right to a hearing], more particularly, is to protect his use and possession of prop-

erty from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .

"The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . .' (407 U.S. at 81)

"[T]he essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property. . . ." (407 U.S. at 97)

In *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 23 L.Ed.2d 349 (1969), Mr. Justice Harlan, in a concurring opinion, explained that the purpose of a hearing prior to deprivation of property is:

"aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." (395 U.S. at 343) (emphasis supplied)

The district court in the case at bar based its dismissal of the action for lack of standing on the ground that:

"If plaintiffs' allegations in the amended complaint are accurate, actions may sound for conversion or for recovery under the generous damage provisions of Ill. Rev. Stat. ch. 26, §9-507-(1). Even their punitive damages may be sustainable. But, under their present status, they do not possess standing to assert these constitutional claims." (Juris. Stat. App. A, p. 4a)

The theory that a possible suit for conversion deprives a plaintiff of standing to contest his right to a hearing in the first place was explicitly rejected by this Court in *Fuentes* as follows:

"If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' " (407 U.S. at 81-82)

"To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced." (407 U.S. at 83)

The district court's ruling in the case at bar amounts to holding that a person who pays his bills on time has no right to a hearing before his property is taken away from him. Yet in *Fuentes* and *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 59 L.Ed. 1027 (1915) this Court held that even a person who is in default has the right to a hearing before losing possession:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." (407 U.S. at 87; 237 U.S. at 424)

To hold that a person who is not in default has less rights than a person in default would be untenable.

Gonzalez has complained that he was deprived of his property without a due process hearing. The district court held that he does not have standing to adjudicate the denial of a hearing because if he would have had such a hearing he would have prevailed. The lower court held that only those persons who would have lost a due process hearing have standing to challenge the fact they were denied such a hearing. This is patently absurd!

We submit that the court below decided an issue that is irrelevant to this case, whether Gonzalez was in default. In doing so, it failed to decide the valid issues that were presented concerning the repossession and transfer of title of automobiles. This cause should therefore be remanded for a decision on the merits.

III.

THE CASE IS NOT MOOT.

The district court secondarily held that Gonzalez lacked standing to seek declaratory and injunctive relief against the practice of repossessing and transferring title of automobiles because his car had already been repossessed and sold and its title transferred. The district court characterized such relief as "useless" and considered the question presented as "hypothetical." Although phrased in terms of standing, this aspect of the lower court's decision actually raises the question of mootness.

The inferred holding of mootness cannot stand in light of recent decisions of this Court. Thus, actions seeking declaratory and injunctive relief against abortion laws were not mooted by the termination of the pregnancies desired to be aborted (*Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 1973; *Doe* v. *Bolton*, 410 U.S. 179, 35 L.Ed.2d 201, 1973); an action challenging a seizure order in a labor dispute was not mooted by the Governor's termination of the order (*Bus Employees* v. *Missouri*, 374 U.S. 74, 10 L.Ed.2d 763, 1963); an action to restrain the use of a state's county unit system as a basis for counting votes in a Democratic primary for the nomination of a United States senator and other state-wide officers was not mooted by either the holding of the election in question or the decision of the Democratic Party to hold the primary election on a popular vote basis (*Gray* v. *Sanders*, 372 U.S. 368, 9 L.Ed.2d 821, 1963); an action seeking injunctive and declaratory relief against segregated bus travel in Memphis, Tennessee was not mooted by the termination of the bus ride during which the plaintiff was required to sit in the back of the bus (*Evers* v. *Dwyer*, 358 U.S. 202, 3 L.Ed.2d 222, 1958); an action brought by candidates for public office challenging a state statute regulating the nominating petitions of independent candidates for office was not rendered moot by the holding of the election in question (*Moore* v. *Ogilvie*, 394 U.S. 814, 23 L.Ed. 2d 1 (1969); and an action by an employer challenging a state statute that made striking workers eligible for public assistance through state welfare programs was not mooted by the termination of the strike in question and the removal of the workers from the welfare roles *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 42 U.S.L.W. 4507 (April 16, 1974).

Under these and other decisions of this Court, the controversy at bar is viable and not moot for any of three separate and distinct reasons:

1. The challenged actions of the Secretary and creditors are capable of repetition, giving rise to a continuing controversy for which declaratory and injunctive relief is appropriate.

2. Without the issuance of declaratory and injunctive relief, the Secretary is free to return to his old ways upon the termination of this litigation.

3. This case was filed as a class action by a party actually harmed by the enforcement of the statutes in question to vindicate not only his own rights but also the rights of those similarly situated.

A. The Actions Of The Secretary And Creditors Are Capable Of Repetition Giving Rise To A Continuing Controversy For Which Declaratory And Injunctive Relief Is Appropriate.

1. The district court's erroneous decision was a natural result of two analytical errors: it failed to recognize the difference between declaratory and injunctive relief; and it approached the issues of relief in the wrong order by considering the appropriateness of injunctive relief as its initial decision.

The amended complaint requested (1) declaratory judgment that certain statutes violate the Fourteenth Amendment and (2) injunctive relief against further enforcement of those statutes by the Secretary and creditors. The district court found that injunctive relief was inappropriate because Gonzalez' automobile had been repossessed, sold and the title transferred—all actions at which plaintiff's requested injunction was not aimed. It thereupon dismissed the complaint for declaratory judgment without further analysis.

This Court has explicitly held that such an approach is error. In *Steffel* v. *Thompson*, ... U.S. ....., 42 U.S. L.W. 4357 (Mar. 20, 1974) this Court held:

> Here, the Court of Appeals held that, because injunctive relief would not be appropriate since petitioner failed to demonstrate irreparable injury . . . it followed that declaratory relief was also inappropriate. Even if the Court of Appeals correctly viewed injunctive relief as inappropriate . . . the court erred in treating the requests for injunctive and declaratory relief as a single issue. (42 U.S.L.W. at 4360.)

In *Zwickler* v. *Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967) this Court found error in a three-judge district court's consideration, as a single question, of the propriety of granting injunctive and declaratory relief. Although noting that injunctive relief might well be unavailable there, this Court held:

> [A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction (389 U.S. at 254.)

The determining effect of a prayer for declaratory judgment on the issue of mootness is starkly shown by opposite decisions of this Court in *Moore* v. *Ogilvie*, 394 U.S. 814, 23 L.Ed.2d 1 (1969) and *Brockington* v. *Rhodes*, 396 U.S. 41, 24 L.Ed.2d 209 (1969). Each case challenged the validity of the statutes that regulated the nominating petitions independent candidates needed to run for office. The elections in which the nominating petition requirements were

challenged had passed in each case. Nevertheless, the mootness contention in *Moore,* an action for declaratory judgment and injunctive relief, was rejected. *Brockington* was held moot. This Court specifically observed that the reason for mootness in *Brockington* was the limited nature of the relief sought and noted that the petitioner there had not sought a declaratory judgment although that avenue was open to him. 396 U.S. at 43. The plaintiff in *Brockington* had limited his claim to a particular election whereas the *Moore* plaintiff had pleaded the ongoing application of the challenged statute.

In this case, Gonzalez is challenging the ongoing application of the repossession and title transfer laws of Illinois. He seeks declaratory judgment that they are unconstitutional. He further seeks injunctive relief to enjoin the future enforcement of the statutes (not to obtain the return of his automobile). Under *Moore,* this action is not mooted by the sale of and transfer of title to one particular automobile.

The district court also failed to address the questions in the proper order. A declaratory judgment in itself can serve as a predicate to further relief, including an injunction. 28 U.S.C. §2202; *Zwickler* v. *Koota,* 389 U.S. 241, 19 L.Ed.2d 444 (1967). Therefore, the declaratory aspects of the case must be decided before consideration of the propriety of injunctive relief. Once declaratory relief has been entered, whether or not injunctive relief will also be issued depends in large part on whether an injunction is necessary in order to enforce and effectuate the declaratory relief. In *Zwickler,* this Court set forth the specific procedure to be followed:

> "It will be the task of the District Court on the remand to decide whether an injunction will be 'necessary or appropriate' should appellant's prayer for declaratory relief prevail. (389 U.S. at 255).

2. The important ingredient that made the above cases (see p. 41) viable and not moot was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society. *Super Tire Engineering Co.* v. *McCorkle,* ..... U.S. ....., 42 U.S.L.W. 4507 (April 16, 1974). A controversy remains alive unless subsequent events make it absolutely clear that there is no reasonable expectation that the wrong will be repeated. *United States* v. *Concentrated Phosphate Export Ass'n., Inc.* 393 U.S. 199, 203, 21 L.Ed.2d 344 (1968); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633, 97 L.Ed. 1303 (1953). See also *Atlantic Richfield Co.* v. *Oil Chemical & A. Wk'rs., Int'l. Union,* 447 F.2d 945, 947 (7th Cir. 1971) ("If past wrongs have been proved, and the possibility of future misconduct survives so does the court's power"); and *Avco Corp.* v. *Local, UAW 787,* 459 F.2d 968, 974 (3rd Cir. 1972). ("If misconduct occurred in the past, and the possibility of its recurrence survives, a case is not moot.")

In the present case, Gonzalez was injured by the actions of Mercantile and the Secretary in repossessing and transferring title to his automobile without notice or hearing. The probability of a recurrence of those actions is sufficiently great to make this a viable controversy. If Gonzalez purchases another car under a security interest, almost a certainty, he will again be subject to summary repossession and transfer of title.

The purchase of automobiles with borrowed money secured by a lien on the vehicle is one of the most common economic transactions in our society. The probability of

Gonzalez, who is only 22 years of age, making another such purchase is much greater than is the possibility that plaintiffs in *Doe* and *Roe* will have another unwanted pregnancy or that Super Tire will be faced with another strike. Indeed, *Moore* was held not moot although there was no indication that Moore ever intended to run for office again. In *Evers,* the lower court found that the plaintiff had ridden a bus in Memphis on only one occasion and had boarded it then for the purpose of instituting the litigation. There was no positive indication he would ever use the Memphis bus system again, but the case was not moot.

In order to render a case moot a recurrence of the situation must be highly improbable. Thus, *DeFunis* v. *Odegaard,* ..... U.S. ....., 42 U.S.L.W. 4578 (April 23, 1974) was rendered moot because "DeFunis will never again be required to run the gauntlet of the Law Schools admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned."

In *Golden* v. *Zwickler,* 399 U.S. 103, 22 L.Ed.2d 113 (1969), Zwickler had been arrested and convicted for violating a New York statute prohibiting the distribution in quantity of anonymous handbills in political campaigns. His arrest resulted from his distribution of handbills which pertained solely to opposing the reelection of a United States congressman. After the reversal of his conviction, Zwickler brought suit in federal court challenging the New York statute on the ground that it was repugnant to constitutional guarantees of free expression. At the time the lawsuit was filed, the congressman was still in office and presumably would seek reelection, when, it was anticipated, Zwickler would again desire to distribute handbills. During the pendency of the case the congressman left the House of Representatives and accepted a 14 year term as

a justice on the Supreme Court of New York. It thus became "most unlikely that the Congressman would again be a candidate for Congress" and therefore Zwickler would not be in the position of again wanting to distribute handbills. At this point the case became moot.

In this case, the probability of Gonzalez being subjected to a repetition of the challenged actions of automobile repossession is much closer to the probabilities in *Doe* and *Roe,* (abortions) and *Super Tire* (aid for strikers) than it is to *DeFunis* (law school) and *Zwickler* (election to Congress of sitting judge).

3. The challenged statutes are still on the books and there is little question that the Secretary and the creditor will continue to enforce the repossession and title transfer laws of the State of Illinois until their unconstitutionality has been finally adjudicated. Until then, the statutes will have a continuing effect upon Gonzalez. Upon the purchase of any car in the future Gonzalez will either have to subject himself to another improper repossession or give up certain rights that are his. In this case Gonzalez was having a dispute with Mercantile over the application of an insurance rebate. Although, at the time of repossession, Gonzalez had not made all of the payments required, Mercantile had received an amount in excess of the total then due. (A. 27) Upon reviewing these facts the district court found that Gonzalez was not in default at the time of repossession. In *Fuentes* this Court recognized that there may be circumstances in which a debtor is relieved from making a payment and is still not in default. However, as long as the creditor can unilaterally determine the question of default, the contractual relationships between the debtor and the creditor are affected by the presence of the statutes.

A citizen of Illinois who cannot purchase automobiles "without being subjected by statutes of special disabilities necessarily has, we think, a substantial, immediate and real interest in the validity of the statute which imposes the disability." *Evers* v. *Dyer*, 358 U.S. at 204. Thus, the challenged activities in the present case "is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests" of the plaintiff. *Super Tire Engineering Co.* v. *McCorkle*, 42 U.S.L.W. at 4509.

B. This Case Is Clearly Not Moot As To The Secretary Because Without Judicial Relief He Is Free To Return To His Old Ways

After this action was filed, the plaintiff sought a temporary restraining order against the Secretary to prohibit him, pending final hearing, "from transferring title and issuing a new certificate of title to a transferee after an involuntary repossession of an automobile until such time as the owner debtor has been given a hearing before an impartial and neutral trier of fact as to the right of the creditor to repossess and sell the automobile and of the Secretary of State to transfer title and issue a new certificate of title." (A. 16) In order to avoid the issuance of a temporary restraining order, the Secretary changed his office procedures. (A. 19) Creditors must now submit an affidavit that notice of the application for a new certificate of title for a repossessed automobile has been sent to the debtor and that the creditor has not received a notice of defense from the debtor. Without such an affidavit, an application for a new certificate of title is no longer granted. (A. 18-21) Upon that representation, the temporary restraining order was denied.

As we have pointed out above, (p. 23) this procedure does not adequately protect the plaintiff class nor does it constitute the declaratory and injunctive relief sought, even to the extent it affords some relief to the plaintiff class.

It does not moot the case. Voluntary cessation of illegal acts does not moot a case if there is a possibility of their renewal after termination of the litigation. "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Company of America*, 148 F.2d 416, 448 (2d Cir., sitting as court of last resort, 1945).

This Court has developed several criteria to be used in determining the likelihood of renewal. Among these are the defendants' continuing claim of the legality of his actions, the timing and purpose of the cessation, and the means used. All three considerations mandate the issuance of declaratory and injunctive relief in this case.

Where a change in conduct is not accompanied by an admission of past illegality, the probability that the conduct will be repeated or renewed in the absence of an adjudication of illegality is obviously strong. *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43, 89 L.Ed. 29 (1944); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 308, 41 L.Ed. 1007 (1897); *Goshen Mfg. Co.* v. *Meyers Mfg. Co.*, 242 U.S. 202, 207 (1916); *United States* v. *Aluminum Company of America*. The Secretary has never admitted nor even inferred that his past procedure was unconstitutional.

The likelihood of repetition may also be inferred more readily if the acts complained of were not discontinued until after litigation had commenced. "It is the duty of the courts to be aware of efforts to defeat injunctive relief

by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit. . . ." *United States* v. *Oregon Medical Society,* 343 U.S. 326, 333, 96 L.Ed. 978 (1952). Here the administrative policy was not changed until after litigation was commenced and a temporary restraining order was requested. The Secretary left no doubt that the change in policy was brought about solely in order to avoid the entry of a temporary restraining order. (A. 19)

The Secretary took his action in the least binding and most easily reversible manner possible. There has been no change in the underlying statute that would prohibit the Secretary from reinstituting his former procedure. There has not even been an officially promulgated rule or regulation affecting the change. That procedure requires notice to the public at large followed by public hearings before a new rule can be instituted. It would, of course, require similar notice and hearings in order to revoke the rule at any subsequent time. (A. 21) Instead the Secretary merely changed his administrative or office policy. (A. 21) This new policy can be reversed as easily and quickly as it was instituted. The plaintiff class has no guarantee that the Secretary will continue his new policy; he has left the road back to his former policy well paved for possible use at the termination of this litigation.

The method used by the Secretary in changing his procedures makes this case much different from *Hall* v. *Beals,* 396 U.S. 45, 24 L.Ed.2d 214 (1969). The plaintiffs in *Hall* were refused permission to vote because of a Colorado statute imposing a six month residence requirement for eligibility to vote in an election. All of the plaintiffs had resided in Colorado for more than two months but less than six months prior to the election. After they instituted

their action challenging the constitutionality of the statute, it was amended to reduce the residency requirement for an election to two months. The plaintiffs could have voted under the new statute and therefore the case was moot. There has been no such change in the statute in this case. Under the amended statute, the Secretary is not prohibited from reinstating the prior procedure.

More analogous to this case is *Bus Employees* v. *Missouri,* 374 U.S. 74, 10 L.Ed.2d 763 (1963), where a state governor attempted to moot a case by terminating his seizure order in a labor dispute. The challenged statute, under which the seizure order had been entered, was still in full force and effect for the governor to use again at any time. This Court held the case not to be moot and decided the constitutionality of the underlying legislation.

In this case, the Secretary is acting pursuant to legislation which remains valid. Until the legality of those statutes has been decided, there is a continuing controversy and the case is not moot.

C. This Case Was Filed As A Class Action By A Party Actually Harmed By The Enforcement Of The Statutes In Question To Vindicate His Own Rights And The Rights Of Those Similarly Situated.

The lower courts have fashioned a rule, in class action cases, that a mooting of the controversy between the named plaintiff and the opposing parties does not necessarily moot the entire case. The representative plaintiff may continue the litigation on behalf of the class. *Parhem* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421 (8th Cir. 1970); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968); *Cypress* v. *Newport News General & Nonsectarian Hosp.*

Ass'n, 375 F.2d 648 (4th Cir. 1967); *Thomas* v. *Clarke,* 54 F.R.D. 245 (D.Minn. 1971); *Gatling* v. *Butler,* 52 F.R.D. 389 (D.Conn. 1971); *Vaughan* v. *Bower,* 313 F. Supp. 37 (D. Ariz. 1970). Contra, *Watkins* v. *Chicago Housing Authority,* 406 F.2d 1234 (7th Cir. 1969).

This Court has never explicitly decided this issue, but the class action doctrine described above is consistent with decisions of this Court. In *DeFunis* v. *Odegaard,* ..... U.S. ....., 42 U.S.L.W. 4578 (April 23, 1974), this Court, in holding the action moot, twice noted that DeFunis brought the suit on behalf of himself alone and not as the representative of any class. In *Brockington* v. *Rhodes,* 396 U.S. 41, 24 L.Ed.2d 209 (1969), the plaintiff challenged statutes regulating nominating petitions of independent candidates for public office. However the plaintiff sued only on behalf of himself regarding a specific election and not as representative of a class. This Court held the case moot "in view of the limited nature of the relief sought" and noted that the plaintiff

> did not attempt to maintain a class action on behalf of himself and other putative candidates, present or future. He did not sue for himself and others similarly situated as independent voters, as he might have under Ohio law. (396 U.S. at 43)

Such nonmooting of class actions is a natural corollary of doctrines described in subsections A and B *supra* where an injury is capable of repetition or a defendant is free to return to his old ways. Thus, when a case is filed as a class action, a change in the status of the representative party would not moot the case if such change was brought about either by a lapse of time or by the efforts of the defendant to give total or partial relief to the representative party in order to be able to continue his challenged conduct against the rest of the class.[18]

In this case, the district court attempts to avoid the class action rule by holding that Gonzalez could not represent the class because he lacked standing himself. To the contrary, Gonzalez has standing to bring this action (see point II above) and therefore has standing to represent the class. Even if his own case were moot, which it is not, Gonzalez could continue to represent the class from injury capable of repetition by a defendant free to return to his old ways.

D. Termination Of The Damage Claim Against Mercantile Does Not Moot The Claims For Declaratory And Injunctive Relief Against Either Mercantile Or The Secretary.

The amended complaint (A. 23) contained three distinct counts describing the various claims of Gonzalez. Count I, pleaded as a plaintiffs and defendants class action, was brought by Gonzalez and three others for declaratory and injunctive relief against Mercantile and other creditors. This count challenged the constitutionality of the Illinois repossession statutes, Ill.Rev.Stat. ch. 26, §§9-503 and 9-504.

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[18] When the changed status of the named plaintiff arises out of factors unrelated to the case or by affirmative action of the representative party the case may be moot. See *Indiana Employment Division* v. *Burney,* 409 U.S. 540, 35 L.Ed.2d 62 (1973), representative party obtained complete relief in proceedings completely unrelated to the litigation; and *Ihrke* v. *Northern States Power Co.,* 459 F.2d 566 (8th Cir. 1972), vacated 409 U.S. 815, 34 L.Ed.2d 72 (1972), named plaintiff challenging the utility termination policies of the defendant moved to a place where she was no longer directly served by the defendant.

Count II, pleaded as a plaintiffs class action, was brought by Gonzalez and the other plaintiffs against the Secretary of State for declaratory and injunctive relief. This count challenged the constitutionality of the title transfer provisions of the Illinois Motor Vehicle Code, Ill.Rev.Stat. ch. 95½, §§3-114(b), 3-116(b) and 3-612. Count IV was brought by Gonzalez against Mercantile for monetary damages.

On December 28, 1973, subsequent to the dismissal of this action by the district court, Gonzalez and Mercantile stipulated that if Gonzalez should prevail on his damage claim against Mercantile, Count IV, the amount of damages awarded would not exceed $750. (A. 54)[14] As noted in Mercantile's motion to dismiss the appeal (p. 3), the full $750 has been paid by Mercantile to Gonzalez and Count IV has been terminated.

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[14] This stipulation was entered into as part of a settlement of another case brought by Gonzalez against Mercantile National Bank and other defendants for fraud and malicious prosecution arising out of a confession of a deficiency judgment against Gonzalez subsequent to the repossession. (*Gonzalez* v. *Chicago, Ill. Motor Sales, Inc., et al.*, No. 73 L 4903, Circuit Court of Cook County). On June 19, 1972, subsequent to the repossession, Mercantile sold the repossessed automobile to Chicago, Illinois Motor Sales for the amount owing to Mercantile by Gonzalez on the retail installment contract. (A. 44) This sale left the contract with a $0 balance and eliminated any possible deficiency judgment. On August 16, 1972, Chicago, Illinois Motor Sales resold the automobile to a third party for $1570. (A. 52) On August 22, 1972 Mercantile assigned the contract back to Motor Sales. A deficiency judgment was then confessed against Gonzalez alleging an August 15, 1972 sale for $700. Shortly after counsel filed an appearance for Gonzalez in the deficiency action, the plaintiff voluntarily dismissed it, giving rise to the countersuit for malicious prosecution and fraud.

The termination of the damage claim, Count IV, has no effect on the claim for declaratory and injunctive relief against Mercantile, Count I. The termination or mooting of one claim for relief in a complaint does not necessarily moot other claims against the same defendant. *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 42 L.W. 4507 (April 16, 1974). A claim for declaratory judgment stands on its own without an accompanying claim for damages. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 81 L.Ed. 617 (1937).

Even assuming, *arguendo*, that the entire case against Mercantile is moot because of Mercantile's payment of the damage claim, the case against the Secretary is not affected. Termination of a case against one defendant does not necessarily affect a case against another. No monetary damage was claimed against the Secretary; the payment of the monetary damages claimed against Mercantile bears no relationship to the declaratory and injunctive claims against the Secretary. The case would be no different in this posture than it would be if Gonzalez had originally sued only the Secretary for declaratory and injunctive relief, a viable action. The payment of damages by Mercantile thus has no effect on the claim against the Secretary. *MacQueen* v. *Lambert*, 348 F. Supp. 134 (M.D. Fla. 1972).

MacQueen is pertinent and applicable to several aspects of the present case. Plaintiffs in that case asked for declaratory and injunctive relief and damages pursuant to 42 U.S.C. §1983. They challenged the constitutionality of the Florida Landlord Lien law, which provided for self-executing possessory liens and prejudgment seizures of tenants' personal property by landlords upon the nonpayment of rent by their tenants. There were two named

landlord defendants. The plaintiffs settled their damage claim against one of the defendants but not against the other. The court held that the settlement of damages with one defendant did not moot the case.

The court also held that Florida's self-help eviction and lien laws violated the due process clause of the Fourteenth Amendment and were thus unconstitutional. In reaching its decision, the court relied on this Court's decisions in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349 (1969) and *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972). It declared continued enforcement of the eviction and lien statutes to be an unconstitutional infringement of plaintiffs' rights to procedural due process. It thereupon issued an injunction against the enforcement of the unconstitutional statutes.

CONCLUSION

For the reasons stated, appellant respectfully requests that this Court (1) determine that substantial constitutional questions are presented against the Secretary of State and Mercantile National Bank; (2) assume jurisdiction of this appeal; and (3) reverse the judgment of the district court and remand the case to that court for a decision on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

Jurisdictional Statutes

28 U.S.C. §2281 *Injunction against enforcement of State statute; three-judge court required*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such s'atute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. §1253 *Direct appeals from decisions of three-judge courts*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Declaratory Judgments Act

28 U.S.C. §2201 *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. §2202 *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX B

United States Constitution

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

Challenged Statutes: Illinois Motor Vehicle Code

Ill.Rev.Stat. ch. 95½, §3-114(b)

If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. In all cases wherein a lienholder has found it necessary to repossess a motor vehicle, and desires to obtain certificate of title for such vehicle in the name of such lienholder, the Secretary of State shall not issue a certificate of title to such lienholder unless the person from whom such vehicle has been repossessed, is shown to be the last registered owner of such motor vehicle and such lienholder establishes to the satisfaction of the Secretary of State that he is entitled to such certificate of title.

Ill. Rev. Stat., ch. 95½, §3-116(b)

The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, the Secretary of State shall make demand therefor from the holder thereof.

Ill. Rev. Stat., ch. 95½, § 3-612. *Repossessor plates*

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions

and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract.

Said special plates shall, in addition to the legends provided in Section 3-412 of this Act, contain a phrase "repossessor" and such other letters or numbers as the Secretary of State may prescribe. If an applicant for such plates is engaged in repossessing vehicles for other persons and does not hold a certificate, registration or permit from the Illinois Commerce Commission to conduct such an operation, the application shall be denied.

APPENDIX D

Challenged Statutes: Illinois Commercial Code

Ill.Rev.Stat., ch. 26, § 9-503. *Secured Party's Right to Take Possession After Default.*

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judical process if this can be done without breach of the peace or may proceed by action.

If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

§ 9-504. *Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition*

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in

the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the second party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

APPENDIX E

NOTICE TO DEBTOR

You are hereby notified that the undersigned intends to apply to the Secretary of State for a new certificate of title to us or our assignee with respect to the automobile repossessed from you on ....., 19.... The automobile was repossessed pursuant to the terms of the contract signed by you on ....., 19...., a copy of which is attached hereto. You are now in default on such debt, the last payment made by you having been the ....., 19...., installment of $.....

Within 15 days after mailing of this notice to you, you must notify the creditor of any defenses you may have to the issuance of a new certificate of title. Sending a notice of defense does not mean that you will have the automobile returned to you. It does mean that the Secretary of State will not issue a new certificate of title to the automobile without the creditor having obtained a court order that the creditor is entitled to possession of the vehicle. The notice of defense shall be mailed, by certified mail, to the creditor at Mercantile National Bank of Chicago, 222 South Riverside Plaza, Chicago, Illinois 60606. Your notice of defense must be by affidavit and shall be in substantially the following form:

> I, ..., hereby (swear) (affirm) that I have made all required payments under the contract through the installment due on the ..... day of ....., 19...., and I have a bona fide defense to the application of Mercantile National Bank of Chicago, for the issuance of a new certificate of title to the automobile, which application is based on a debt contracted on the ..... day of ....., 19.... (Note: If the basis of your defense is invalid, you may be liable to the creditor for the costs incurred by the creditor because of such invalidity.)
>
> .....

Subscribed and sworn to before me this ..... day of ...., 19.....